# In the Supreme Court of the United States

OCTOBER TERM, 1973

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No. 73-1103

ROCCO MEMMOLO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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The petitioner, who was not indicted, contends that the court of appeals should have reviewed the district court's denial of his motion to inspect his intercepted communications, the order authorizing the interception, and the application therefor.

Petitioner's telephone conversations were overheard and recorded pursuant to a court authorized wiretap of one Vincent Luongo on May 25 and 26, 1973. On August 23, 1973, petitioner was notified of the interception pursuant to the requirements of 18 U.S.C. 2518(8)(d). On August 27, petitioner filed a motion in the United States District Court for the District of Massachusetts under 18 U.S.C. 2518(8)(d) to inspect the intercepted conversations, the application and the order authorizing the interception. Petitioner was not then under indictment, and had not been called to testify

before the grand jury which was considering matters involved in the telephone interception. The United States District Court for the District of Massachusetts denied the motion as premature, since allowing inspection before petitioner appeared before the grand jury might violate grand jury secrecy (Pet. App. D). The court of appeals dismissed the appeal for lack of appellate jurisdiction (Pet. App. A).

Petitioner contends that the district court's denial of his motion for inspection was a final order, subject to review by the court of appeals. This Court need not reach that question, however. In the circumstances, the district court's action was so plainly not an abuse of its discretion under 18 U.S.C. 2518(8)(d) that review by the court of appeals could not have benefited the petitioner.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 82 Stat. 212, *et seq.* (18 U.S.C. 2510-2520) sets forth a comprehensive scheme for regulating court-authorized wire interceptions. Provisions are made for post-interception notice and disclosure of certain information concerning the wire interception under certain limited circumstances. Basically, the statute requires that notice of the fact of the wire interception be provided to the named subject and to such other parties to the intercepted communications as the issuing judge directs; on motion the court may, in its discretion, permit the persons so notified to inspect such portions of the intercepted communications, orders, and applications as it determines to be in the interest of justice (18 U.S.C. 2518(8)(d)). Prior to disclosure of any information from the wire interception in any adversary proceeding, the parties to the proceeding must receive copies of the application and court order, whether or not they have previously received the inventory notice (18 U.S.C.

2518(9)). Any aggrieved person in such an adversary proceeding may bring a motion to suppress information from the wire interception, and he may then, in the judge's discretion, be granted discovery of portions of the intercepted communications (18 U.S.C. 2518(10)(a)).

Petitioner was not entitled to disclosure of any of the information specified in his motion. It is clear from 18 U.S.C. 2518(8)(d) and 2518(10) that the disclosure of portions of the intercepted conversations themselves is always made subject to the district court's determination that such disclosure would serve the interests of justice. The court here concluded that it would not order such disclosure, on the ground that disclosure before petitioner appeared before the grand jury might violate grand jury secrecy (Pet. App. 10). This refusal to interfere with the functions of the grand jury was a proper exercise of the court's discretion and served the interests of justice.

A party to any "trial, hearing, or other proceeding in a Federal or State court" in which any intercepted communication or evidence derived therefrom is to be introduced in evidence is entitled to a copy of the application and court order authorizing the interception not less than 10 days before the proceeding. 18 U.S.C. 2518(9). But petitioner had no right to the application or order under Section 2518(10), since he was not under indictment, and no information derived from the interception was being offered in evidence in any trial, hearing, or other proceeding involving him.

Petitioner did face the possibility that he would be called before the grand jury considering matters relating to the interception and he alleges that information from the interception was used in the application for a search warrant. Neither of these uses of evidence de-

rived from the interception, however, would give petitioner the right to a copy of the application and order under 18 U.S.C. 2518(10). That Section applies to adversary type hearings, and does not include a grand jury hearing (S. Rep. No. 1097, 90th Cong., 2d Sess., p. 105). Since an application to a magistrate for a search warrant is not an adversary hearing, the use of evidence derived from an interception in such an application does not require disclosure under 18 U.S.C. 2518(10).

In sum, the district court's denial of petitioner's motion to inspect the order, application and intercepted communications before he was indicted or even called before the grand jury was a proper exercise of the court's discretion, and no further review is required.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

APRIL 1974.

DOJ-1974-04